

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SUSAN L. SEIM)	
Claimant)	
VS.)	
)	Docket No. 1,059,244
U.S.D. 305)	
Respondent)	
AND)	
)	
TRAVELERS INDEMNITY CO. OF AMERICA)	
Insurance Carrier)	

ORDER

Respondent requests review of the October 18, 2012, Nunc Pro Tunc Order entered by Administrative Law Judge Bruce E. Moore.

APPEARANCES

Kelly W. Johnston, of Kechi, Kansas, appeared for the claimant. Matthew J. Schaefer, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopts the same stipulations and considered the same record as the ALJ, consisting of the depositions of Rachel Dawn Sauer, with exhibits; Julie Denise Work and Shane Andrew Reif, with exhibits, all taken on April 30, 2012; the preliminary hearing transcript taken on May 11, 2012, with exhibits; the preliminary hearing transcript taken on October 16, 2012, with exhibits; and the transcript of the deposition of Mark Bernhardt, M.D., taken on October 12, 2012, with exhibits.

ISSUES

Respondent contends claimant failed to prove that she suffered injury by accident on October 24, 2011, while working as a paraprofessional for respondent. Respondent argues claimant's physical problems are the result of the natural aging process and the normal activities of day-to-day living.

The Administrative Law Judge (ALJ), apparently finding in claimant's favor, ordered respondent to pay claimant's incurred medical expenses to May 16, 2012 as authorized and to reimburse claimant \$487.50 in unauthorized medical. Temporary total disability compensation was ordered paid at the rate of \$265.35 per week for the period November 16, 2011 until May 16, 2012. Claimant's request for additional medical treatment was denied, as the ALJ found claimant failed to establish that she is in need of additional treatment as a result of the work-related accident and resulting injury which occurred on October 24, 2011.

The respondent requests review of whether claimant suffered an accident, resulting in a personal injury, and whether that accident and resulting injury arose out of and in the course of her employment with respondent. Respondent argues the ALJ's Order should be reversed.

Claimant argues the accident and resulting injuries occurred while she was performing her duties for respondent. Therefore, the Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant began working for respondent as a paraprofessional on December 4, 2009, in the Early Head Start Program. Claimant's job required she work with two other employees, Rachel Sauer and Julie Work, as they supervise up to eight children, aged zero to three years. Some of the children could walk, others required diaper changes and all needed assistance eating the two meals per day they were provided in the program. After meal time the workers were required to clean up the area, including the tables, chairs and the floor. On October 24, 2011, the alleged date of accident, claimant was cleaning up after lunch. As she stood up from cleaning the floor, she felt a sensation in her back which she described as painful, but not bad. Later that same day, she was again on the floor helping the children put on their shoes and socks after their nap, when the phone rang. As claimant stood up to answer the phone, she experienced a pain in her back which prohibited her from standing the entire way. She could not move. Both Ms. Sauer and Ms. Work, who identified themselves as claimant's "teammates", saw claimant standing, bent over at the waist, holding on to an indoor toy called a loft and went to claimant's aid.

Respondent's human resources specialist, Shane Reif, was contacted, and after talking to claimant, Mr. Reif contacted the Board of Education and reported the accident. Claimant was then referred to James J. Shafer, M.D., of Comcare, P.A. X-rays taken on October 27, 2011, and an MRI scan taken on November 1, 2011, showed degenerative changes in claimant's thoracic and lumbar spines and in her hips. The degenerative findings at several levels in claimant's back are significant and lengthy, and will not be

listed herein. It is clear claimant suffered degeneration on several levels and included several medical conditions.

Claimant ultimately came under the care of Matthew Henry, M.D., at the Abay Neuroscience Center, on November 15, 2011. Dr. Henry, after reviewing the many tests on claimant, diagnosed spinal stenosis at L2-3 and L3-4, spondylolysis at L5-S1 and spondylolisthesis at T10-11. Claimant displayed loss of bladder function and clumsiness in her lower extremities with increased reflexes, which caused Dr. Henry concern. Dr. Henry admitted claimant into the hospital the next day and performed T10 and T11 laminectomies, a T10-11 posterolateral fusion and L2-3-4 laminectomies on claimant. The surgery reduced the numbness in claimant's feet and left thigh, although not totally. Claimant's mid-back pain and weakness in her legs also improved.

Claimant was referred, by her attorney, to pain management specialist George G. Fluter, M.D. on February 27, 2012, for an evaluation. The history provided to Dr. Fluter was consistent with claimant's reported accidents. Claimant displayed pain affecting the mid to lower back and buttocks with numbness into the left leg and both feet. The pain level at the time of the examination was 5 on a scale of 10. Claimant was diagnosed with mid to low back pain; lower thoracic myelopathy at T10-11; lumbar discopathy with radiculopathy at L2-3 and L3-4, and post surgery in the thoracic and lumbar spines. Dr. Fluter found a causal/contributory relationship between claimant's current condition and the injuries suffered on October 24, 2011, with the accident being the prevailing factor for the injuries and resulting surgeries to both the lumbar and thoracic spines.

Claimant was referred by respondent to board certified neurological surgeon Paul S. Stein, M.D., for an examination on April 23, 2012. The history provided was consistent with claimant's description of the accidents on October 24, 2011, with an onset of symptoms in the lower back and extremities on the date of accident. Dr. Stein found extensive degenerative disease in claimant's entire spine resulting in substantial spinal canal stenosis. He opined the stenosis preexisted the October 24, 2011, accident and was the prevailing factor in claimant's symptomatology. He acknowledged the symptomatology was precipitated by the specific positions and spinal stresses at claimant's work on the date of accident.

On May 18, 2012, the ALJ, pursuant to K.S.A. 44-516, referred claimant to board certified orthopedic surgeon Mark Bernhardt, M.D., for an independent medical evaluation. The history provided to Dr. Bernhardt was consistent with the prior injury histories provided to Dr. Fluter and Dr. Stein. Claimant was diagnosed with low back pain; thoracic back pain; thoracic myelopathy; thoracic spondylosis; thoracic spinal stenosis; lumbar spondylosis; lumbar spinal stenosis; T10-11 degenerative spondylolisthesis; and L4-5 and L5-S1 spondylolisthesis. Claimant was post T10-11 laminectomies and fusion and post L2-3-4 laminectomies. Dr. Bernhardt determined that only the thoracic myelopathy and need for spine surgery in November 2011 were the result of the October 24, 2011, accidents with the accidents being the prevailing factor in the development of the thoracic myelopathy and

resulting surgeries. The remaining problems, including claimant's ongoing pain complaints, were from claimant's multiple degenerative conditions in her thoracic and lumbar spines which pre-existed the October 24, 2011, accidents and were also the result of the nature aging process.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b states:

(a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

(d) Except as provided in the workers compensation act, no employer, or other employee of such employer, shall be liable for any injury, whether by accident, repetitive trauma, or occupational disease, for which compensation is recoverable under the workers compensation act nor shall an employer be liable to any third party for any injury or death of an employee which was caused under circumstances creating a legal liability against a third party and for which workers compensation is payable by such employer.

K.S.A. 2011 Supp. 44-508(f)(1)(2)(3)(A)(C) states:

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

(B) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.

(C) The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

K.S.A. 2011 Supp. 44-508(g)(h) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

Respondent argues claimant suffers from several pre-existing, degenerative conditions in her thoracic spine. This makes her susceptible to the thoracic myelopathy diagnosed by the examining health care providers. Dr. Stein agreed with respondent's position, finding claimant's ongoing problems were the result of pre-existing stenosis. Dr. Flutter agreed with claimant's position, finding a causal/contributory relationship between claimant's work accidents and her ongoing need for medical treatment. Due to the conflict in medical opinions, the ALJ elected to refer claimant for an independent medical evaluation with Dr. Bernhardt. In essence, Dr. Bernhardt agreed and disagreed with both experts. He determined claimant's thoracic myelopathy and spinal surgeries were the result of the accidents at work. But, he also determined that claimant's ongoing problems are the result of claimant's many degenerative conditions in her back. This Board Member agrees. It is clear this claimant suffered from long standing degeneration in her thoracic, cervical and lumbar spines. These problems impacted her complaints, but were not solely responsible for claimant's need for treatment. Claimant's job injuries also impacted her need for treatment, specifically the surgeries on her lumbar and thoracic spines.

The Kansas Supreme Court provides a lengthy and detailed analysis of the natural aging process and day-to-day living in *Bryant*.¹ In *Bryant*, the Court acknowledged the difficulty in determining a work-injury from what appear to be normal daily activities, including standing, kneeling, walking and something as simple as rising from a chair. The Court determined that:

...the proper approach is to focus on whether the injury occurred as a consequence of the broad spectrum of life's ongoing daily activities, such as chewing or breathing or walking in

¹ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255, (2011).

ways that were not peculiar to the job, or as a consequence of an event or continuing events specific to the requirements of performing one's job. "The right to compensation benefits depends on one simple test: Was there a work-connected injury? . . . [T]he test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment." 1 Larson's Workers Compensation Law, § 1.03[1] 2011.²

The Court went on to hold:

Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the {sic} whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement-bending, twisting, lifting, walking, or other body motions-but looks to the overall context of what the worker was doing-welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.³

This claimant was not engaged in a normal activity of day-to-day living when she was on the floor assisting the young children dress after their afternoon nap. When the phone rang, she arose to answer, as was part of her normal job responsibility. While sitting, kneeling and standing are, at times, a normal part of one's day, in this context, they were clearly connected to claimant's job as a paraprofessional. This Board Member finds claimant suffered injury by accident on October 24, 2011, which arose out of and in the course of her employment with respondent. Those accidents are the prevailing factor causing the injuries and medical condition identified as thoracic myelopathy, leading to the thoracic and lumbar spine surgeries. The Nunc Pro Tunc Order dated October 18, 2012, is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven that the accident on October 24, 2011, arose out of and in the course of her employment with respondent, and is the prevailing factor leading to the development of the thoracic myelopathy and need for thoracic and lumbar surgeries. However, claimant has failed to prove her need for ongoing medical treatment stems from the work related accidents, but instead stem from her ongoing degenerative spinal conditions. The Nunc Pro Tunc Order of the ALJ dated October 18, 2012, is affirmed.

² *Id.* at 595-596.

³ *Id.* at 596.

⁴ K.S.A. 2011 Supp. 44-534a.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Nunc Pro Tunc Order of Administrative Law Judge Bruce E. Moore dated October 18, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2013.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge